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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVIONE MCDOWELL,

Defendant and Appellant.

B235921

(Los Angeles County
Super. Ct. No. BA330955)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Clifford L. Klein, Judge. Affirmed as modified with directions.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and
Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Davione McDowell of one count of first degree murder (count 1), three counts of premeditated attempted murder (counts 2, 3, 7), and four counts of attempted second degree robbery (counts 4, 5, 6, 8). (Pen. Code, §§ 187, subd. (a) [count 1], 664, 187, subd. (a) [counts 2, 3, 7], 664, 211 [counts 4, 5, 6, 8].)¹ It also found true the criminal street gang and gun use enhancement allegations in each count. (§§ 186.22, subd. (b)(1), 12022.53, subds. (b)-(d).) The trial court imposed a sentence of 95 years to life, plus two consecutive life terms.²

In his appeal from the judgment, defendant contends that: (1) the evidence was insufficient to identify him as the perpetrator; (2) the prosecution failed to establish the motive and specific intent requirements of the gang enhancement allegations; and (3) his request to continue the sentencing hearing was improperly denied. We will modify the judgment to correct the sentence. Finding no other substantive error, we affirm the judgment, as modified.

¹ Unless otherwise designated, all further statutory references are to the Penal Code.

² The sentence of 95 years to life on counts 1, 2, and 3 consisted of: (1) on count 1, first degree murder of Johnny Stringer, a base term of 25 years to life (§ 187, subd. (a)), plus a consecutive term of 25 years for the gun enhancement (§ 12022.53, subd. (d)), for a total term of 50 years to life; (2) on count 2, premeditated attempted murder of John Kennedy, a consecutive term of life (§§ 664, 187, subd. (a)), plus a consecutive term of 20 years for the gun enhancement (§ 12022.53, subd. (c)), for a total consecutive term of 20 years to life; (3) on count 3, premeditated attempted murder of Keith Pierre, a consecutive term of life (§§ 664, 187, subd. (a)), plus a consecutive term of 25 years for the gun enhancement, for a total consecutive term of 25 years to life.

On count 7, premeditated attempted murder of Duron Marshall, the court imposed a concurrent term of life (§§ 664, 187, subd. (a)), plus a concurrent term of 20 years for the gun enhancement (§ 12022.53, subd. (c)).

The court imposed and stayed the gang enhancement on counts 1, 2, 3, and 7. (§ 186.22, subd. (b)(1)(C).)

The court imposed concurrent sentences as to counts 4, 5, 6, and 8 for the attempted second degree robbery of Stringer, Kennedy, Pierre, and Marshall. (§§ 664, 211.) The sentence on each count consisted of a concurrent term of one-half the midterm of three years (18 months), plus a concurrent term of 20 years for the gun enhancement (§ 12022.53, subd. (c)), plus a concurrent term of 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)), for a total concurrent term of 31 years, 6 months.

BACKGROUND

On the afternoon of September 1, 2005, seven men (the men) were playing a game of dice in the driveway of Johnny Stringer's home near 100th Street and Harvard in the City of Los Angeles. Approximately \$1,000 in cash was visible on the driveway.

The assailant, who had a bag in his left hand and a gun in his right pants pocket, walked past the driveway, turned around, and "cut across the grass" to approach the men without being seen. The assailant stopped within five or ten feet of the men and "fumbled" in his pocket for about 10 seconds before pulling out a gun and demanding, "Break yourself," which meant, "Give me the money." As the men turned and ran, the assailant began shooting.

Four of the men were hit by the assailant's bullets. Stringer was killed, and Kennedy, Pierre, and Marshall were wounded. The assailant ran away without the money.

Los Angeles Police Detective Theodore Hammond responded to the scene and investigated the shooting. That evening, Hammond interviewed Marshall, who described the assailant as a "male Black, carrying a bag," "about 5'6" or 5'7"," with "wavy hair" and thick eyebrows, and wearing a white t-shirt and black shorts. Marshall worked with a sketch artist to create a drawing of the suspect.

Hammond obtained a still image from the surveillance video camera at a nearby restaurant (Bertha's Restaurant). The still image (People's 14), which was taken near the time of the shooting, depicted a Black male in a white t-shirt and black shorts as he carried a bag across the parking lot.

Early in the investigation, Hammond received information that made Timothy Hicks, an 8-Trey Gangster, a person of interest. On September 25, 2005, Hammond showed Marshall a six-pack that included photographs of defendant and Hicks. Marshall did not identify anyone at that time.

In October 2005, Hammond interviewed a nearby resident, Gloria Genyard, who had observed the assailant as he ran past her after the shooting. Hammond showed Genyard a six-pack that included Hicks's photograph. Genyard selected Hicks's photo, but "stated she wasn't sure. She said, 'I think he looks most like the guy.'"

In October 2005, Hammond interviewed Pierre, the victim in count 3. Hammond showed Pierre a six-pack that included Hicks's photograph. Pierre selected Hicks's photo as the one that "most likely looked like the shooter of Johnny."

In August 2006, Hammond showed Marshall a new six-pack that included a more recent photo of defendant. This time Marshall identified defendant as the assailant.

In September 2006, Hammond showed Genyard a new six-pack that included a more recent photograph of defendant. This time Genyard selected defendant's photo and stated, "That's him."

In March 2007, Hammond interviewed Andre Pommells, who was present but not injured in the shooting. Pommells was shown a six-pack that included defendant's photograph. He also identified defendant as the assailant.

In April 2008, Marshall identified defendant in a live lineup and during a court proceeding.

Defendant was charged with one count of first degree murder (count 1), three counts of premeditated attempted murder (counts 2, 3, 7), and four counts of attempted second degree robbery (counts 4, 5, 6, 8). Criminal street gang and gun use enhancements were alleged as to each count.

At trial, Marshall, Genyard, Pierre, and Pommells positively identified defendant in court as the assailant. Their testimony established that initially, two eyewitnesses (Genyard and Pierre) selected Hicks as the person who most closely resembled the assailant and Marshall failed to identify anyone; later, all four eyewitnesses were shown a six-pack that contained a more recent photo of defendant, whom they all identified as the assailant.

The prosecution also presented People's 14, the still photo from the nearby restaurant's surveillance videotape, which depicted defendant crossing the parking lot

around the time of the shooting, holding the same bag and wearing the same clothing as the assailant. Marshall testified that when he was first shown People's 14,³ he immediately recognized the assailant: "I remember just looking at the picture [People's 14] and I was, like — and then showing the bag, and with the white t-shirt, what t-shirt he had on and shorts he had on. [¶] Q Did you say 'That's the person who did the shooting'? [¶] A Yeah. I said that's what he had on, that's what he had on, that's what he looked like. [¶] Q Did you say this person depicted in the photograph is wearing the clothing similar to the man who came and shot you? [¶] A Yes. [¶] Q Did you say the person in this photograph depicted is the man who came and shot at you? [¶] A Yes."

Pommells testified that about three or four months after the shooting, he unexpectedly saw the assailant (whom he identified in court as defendant) in the same neighborhood and they got into a "fist fight." They also "exchanged words," but Pommells could not recall what was said. Pommells called Hammond to tell him about his encounter with the assailant.

Hammond, who was the prosecution's expert witness on criminal street gangs, testified that in his expert opinion, based on his experience as a gang officer and the information obtained during this investigation: (1) defendant belongs to the Underground or UG Crips and was assisted in this crime by a getaway driver from the Block Crips; (2) the only gangs that would commit a crime together in this particular neighborhood are the UG Crips and Block Crips; and (3) because Hicks is an 8-Trey Gangster, which is a rival of both the UG Crips and Block Crips, Hicks would not have worked with either gang and was not involved in this crime.

Defense witness Michael Eisen, Ph.D., testified as defendant's expert witness on eyewitness identification. He explained the general unreliability of eyewitness identifications but did not evaluate the particular identifications made in this case.

Additional evidence relevant to the issues on appeal will be discussed below.

³ Hammond testified that he first showed People's 14 to Marshall at a prior court proceeding on April 28, 2008.

DISCUSSION

I. Substantial Evidence Supported a Finding of Guilt Beyond a Reasonable Doubt

Defendant contends that the evidence was legally insufficient to support his conviction because the eyewitness identifications were unreliable and contradictory. He argues that as a result of the prosecution's failure to sustain its burden of proof beyond a reasonable doubt, his state and federal due process rights were violated. We conclude, however, that the record contains substantial evidence to support defendant's conviction.

A. Standard of Review

In *People v. Boyer* (2006) 38 Cal.4th 412, the California Supreme Court set forth the applicable standard of review:

“On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. (*People v. Carter* (2005) 36 Cal.4th 1114, 1156; [*People v.*] *Ochoa* [(1998)] 19 Cal.4th 353, 413-414; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Evidence meeting this standard satisfies constitutional due process and reliability concerns. (*Carter, supra* at p. 1156; *People v. Osband* (1996) 13 Cal.4th 622, 690.)

“While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the prosecution, and must presume every fact the jury could reasonably have deduced from the evidence. (*People v. Carter* (2005) 36 Cal.4th 1215, 1257-1258; *People v. Hillhouse* (2002) 27 Cal.4th 469, 496 . . . ; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Issues of witness credibility are for the jury. (E.g., *Ochoa, supra*, 19 Cal.4th 353, 414; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

“Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime. (See *People v. Anderson* (2001) 25

Cal.4th 543, 570-575) Moreover, a testifying witness's out-of-court identification is probative for that purpose and can, by itself, be sufficient evidence of the defendant's guilt even if the witness does not confirm it in court. (*People v. Cuevas* (1995) 12 Cal.4th 252, 263-275 (*Cuevas*), overruling *People v. Gould* (1960) 54 Cal.2d 621, 631; see Evid. Code, § 1238.) Indeed, 'an out-of-court identification generally has *greater* probative value than an in-court identification, even when the identifying witness does not confirm the out-of-court identification: "[T]he [out-of-court] identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. [Citations.] . . ." [Citations.]' (*Cuevas, supra*, at p. 265.)" (*People v. Boyer, supra*, 38 Cal.4th at pp. 479-480.)

B. Analysis

We conclude that the prosecution provided substantial evidence of defendant's guilt beyond a reasonable doubt for the following reasons.

Numerous eyewitness identifications of defendant were made both in and out of court. All of the identifications were corroborated by People's 14, which showed defendant crossing a nearby restaurant's parking lot around the time of the shooting, carrying the same bag and wearing the same clothing that Marshall had described immediately after the crime.

Defendant argues that the identifications were inconsistent. However, two of the four eyewitnesses were consistent in their identifications of defendant and they selected only his photo and no others. Even though Marshall did not identify defendant's photo in the first six-pack, the jury had both six-packs and could assess, by examining the two photos of defendant at different ages, the significance, if any, of Marshall's failure to identify defendant in the first six-pack. Contrary to defendant's suggestion that Marshall's identification could have been tainted by his exposure to People's 14, there was no evidence that Marshall was shown People's 14 before the second photo lineup. At best, Marshall did not recall when he first saw People's 14. Even if the jury

concluded that Marshall was shown People's 14 before the second photo lineup, the jury could have reasonably found that because it was Marshall who had given the original description that made the retrieval of defendant's matching image from the surveillance videotape possible, Marshall would have recognized defendant's photo in the second six-pack regardless of People's 14.

Although defendant refers to Pommells's testimony regarding his fistfight with defendant as a "rather unbelievable tale," there was nothing inherently unbelievable about his testimony. Defendant argues that Pommells kept the fight a "secret," but the evidence showed, to the contrary, that Pommells had told Hammond about the fight. Defendant points out that Pommells did not make an identification until 2007, but we fail to see how that benefits defendant. Because the record was silent as to why Pommells's identification was made in 2007 and not earlier, we infer in favor of the judgment that the timing was insignificant.

Finally, defendant argues that Genyard's identification of defendant was weak and unreliable because she first selected Hicks's photo, then selected defendant's photo, and when shown a photo of Hicks at trial, said she had never seen him before. In addition, Genyard testified at trial that she had never seen defense counsel Kallen, even though Kallen had questioned her at the preliminary hearing. In our view, these discrepancies are immaterial because issues of witness credibility are for the jury to decide. (See *People v. Ochoa*, *supra*, 19 Cal.4th at p. 414.) And even if we were to disregard Genyard's identification of defendant, the remaining witnesses' identifications are more than sufficient to uphold the verdict, because the "[i]dentification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime. [Citation.]" (*People v. Boyer*, *supra*, 38 Cal.4th at p. 480.)

II. Substantial Evidence Supported the Jury’s True Findings on the Gang Enhancement Allegations

Based on the jury’s finding that the prosecution had met the gang enhancement requirements,⁴ the trial court imposed and stayed the gang enhancement on counts 1 (murder of Johnny Stringer), 2, 3, and 7 (attempted murder of Kennedy, Pierre, and Marshall), and imposed a concurrent 10-year enhancement on counts 4, 5, 6, and 8 (attempted second degree robbery of Stringer, Kennedy, Pierre, and Marshall). (§ 186.22, subd. (b)(1)(C).)

On appeal, defendant challenges the gang enhancements on the ground that Hammond’s expert opinion was the prosecution’s sole evidence that the crimes were committed: (1) for the benefit of, at the direction of, or in association with any criminal street gang; and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members. For the reasons that follow, we conclude that the disputed findings were supported by substantial evidence.

⁴ In order for a sentence enhancement under the Street Terrorism Enforcement and Prevention Act, also known as the STEP Act (§ 186.20 et seq.), to apply, the prosecution must prove that the felonious conduct was “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) “In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a “pattern of criminal gang activity” by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called “predicate offenses”) during the statutorily defined period. (§ 186.22, subs. (e) and (f).) (*People v. Gardeley* [(1996)] 14 Cal.4th [605,] 616-617.)” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047 (*Hernandez*).)

As defendant does not dispute the sufficiency of the evidence to support the determination that he belongs to a gang that committed two or more of the enumerated offenses during the statutorily defined period, we need not discuss that aspect of the evidence.

A. *Hammond's Expert Testimony*

"In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs. (*People v. Gardeley, supra*, 14 Cal.4th at pp. 617-620.)" (*Hernandez, supra*, 33 Cal.4th at pp. 1047-1048.) Hammond's expert testimony included the following:

Based on defendant's tattoos, gang moniker, and recorded telephone calls made while in jail, it was Hammond's expert opinion that defendant belongs to the Underground or UG Crips. The UG Crips's primary activities include robbery, assault with a deadly weapon, and the sale of narcotics. The UG Crips will "rob, cheat, steal, and kill" in order to obtain the funds needed to purchase weapons, automobiles, jewelry, clothes, and narcotics. The UG Crips will recruit younger members who are less likely to be punished as adults.⁵ If a young gangster commits or attempts to commit a robbery of a substantial sum, such as \$1,000, he will "probably" give the proceeds "to the more seasoned O.G.'s, original-gangster[s], who are a little bit older." If a young gangster demonstrates a willingness to commit a crime of extreme violence, he will be "considered one of the fellows at that point. He's not just out there operating on name." He will have "more stature" and be "looked upon more favorably by his fellow gang members."

This crime occurred in "[a] very unique area" where several rival gangs operate. A gang in this area must be strong in order to survive, which is why the UG Crips, Block Crips, and 100s Crips work together. Because gangs control "who is allowed to operate in a particular neighborhood," it is unlikely that a single individual could commit this robbery without having to share the proceeds with a gang. "If you're not giving out any kickbacks, you just don't operate your own program" in an area like this that is dominated by criminal street gangs.

During his investigation of this case, Detective Hammond received reliable information that a member of the Block Crips was in the assailant's getaway car. In Detective Hammond's experience, a Block Crip and a UG Crip will work together, but

⁵ Defendant, who was born on October 1, 1987, was one month shy of his 18th birthday on the date of this crime.

neither will work with an 8-Trey Gangster. In light of the information that a Block Crip was in the getaway car, Hammond eliminated Hicks, who is an 8-Trey Gangster, as a suspect in this case.

Based on a hypothetical crime that fit the facts of this crime, Detective Hammond testified that in his expert opinion, the assailant committed the hypothetical crime for the benefit of a gang and in association with another gang member: “Q Detective, I want you to assume that there is . . . a group of individuals playing dice, there was a large amount of money on the ground. An individual comes up to him and has a getaway ready. This individual goes up to the game, orders everybody to give him the money, a young individual within the gang, still rising. If this individual commits a robbery and during the course of a robbery is disrespected, if nobody gives him the money, and he starts shooting, killing one person, injuring two other people, and narrowly missing several other people that are standing by, is that act done for the benefit of the gang, and does it benefit that particular gang member within his own gang in furthering his rise as a gang member? [¶] A Yes. [¶] Q And what is the basis of that? [¶] A First of all, it gives him big power. It gives him street clout. It gives him clout within the gang. If someone acted alone, it may be a little different. But when two gather together, I have a strong opinion on the gang involvement. [¶] Q What if they don’t get the money? I mean, all they did was they went there, they shot some people up, but they didn’t get the money. I mean, do they still get respect for that act, even though they didn’t get the money? [¶] A Absolutely. [¶] . . . [¶] Q . . . You said one of the benefits is that witnesses will be scared and fear will be instilled in the community. How is it that instilling fear in the community helps a gang operate and helps it extend its influence within that community . . . ? [¶] A You can commit crimes at will, at random. No one is going to testify. No one’s going to come forward. You operate in broad daylight”

B. Substantial Evidence Supported the Motive and Specific Intent Findings

Defendant contends the sole evidence that he committed the crimes in association with another gang member was “Detective Hammond’s testimony that he ‘received

information’ that a getaway driver, who was a Block Crip, was waiting for the person who robbed the Stringer dice game. [Internal record reference omitted.] The detective’s ‘information’ was inadmissible hearsay on the existence of a getaway driver. (Evid. Code § 1200.) While Detective Hammond could testify as a gang expert on the habits and culture of street gangs, based upon reliable hearsay, he was not a percipient witness to the Stringer dice game robbery. (People v. Gardeley[, *supra*,] 14 Cal.4th 605, 617-618.) His testimony could not be admitted for its truth: that a getaway driver actually existed. Moreover, none of the percipient witnesses testified that they saw a getaway driver. The state failed to prove that the Stringer robbery was committed ‘in association’ with a criminal street gang.”⁶

We conclude that, regardless of any involvement by another gang member, the evidence was sufficient to support a reasonable inference that the crimes were committed for the benefit of a gang and with the specific intent to assist in the criminal conduct of a gang. The prosecution presented Hammond’s expert testimony that defendant belongs to a gang, the UG Crips, that will “rob, cheat, steal, and kill” in order to obtain the funds that it needs to purchase weapons, automobiles, jewelry, clothes, and narcotics. He also

⁶ Neither party mentions the trial court’s exclusion of all direct evidence that (1) defendant was aided and abetted by “Mr. Christon,” the getaway driver who belonged to the Block Crips, and (2) Christon was convicted as an accomplice in a previous trial in which gang enhancement allegations were found to be true.

The prosecution argued at an Evidence Code section 402 hearing that the other gang member’s (Christon’s) presence in the getaway car was relevant to prove the motive and specific intent elements of the gang enhancement allegations. The trial court agreed that the evidence was relevant and reliable, particularly in light of Christon’s conviction of the underlying crimes and gang enhancement allegations, but nevertheless excluded all direct evidence of Christon’s involvement as an accomplice.

As a result of the exclusionary ruling, the prosecution was prohibited from introducing direct evidence of the presence of the other gang member in the getaway car. The prosecution was only allowed to refer to the other gang member indirectly, through Hammond’s testimony that, in forming his expert opinion, he had relied upon the information concerning the other gang member’s presence in the getaway car.

In light of the exclusionary ruling, defense counsel urged the trial court to strike the gang-related testimony if it found the evidence was insufficient to show that the crime was gang-related. The trial court denied this request.

testified that a young gangster who commits or attempts to commit a \$1,000 robbery in this neighborhood would “probably” give the proceeds “to the more seasoned O.G.’s, original-gangster[s], who are a little bit older.” Based on this evidence, it was reasonable to infer that because the area was controlled by rival gangs, a young gangster such as defendant was unlikely to commit an armed robbery of \$1,000 without intending to use at least part of the proceeds to support his gang’s illicit activities. (“If you’re not giving out any kickbacks, you just don’t operate your own program.”) As this reasonable inference is based on substantial evidence that is not dependent upon the existence of an accomplice, we reject the claim of insufficient evidence as unsupported by the record.

III. Defendant Was Not Prejudiced by the Denial of His Request to Continue the Sentencing Hearing

Defendant contends that the trial court erred in denying his request to continue the sentencing hearing in violation of his state and federal due process rights. In support of his contention, he cites section 1170, subdivision (b), which provides in relevant part: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation.”

Based on the above statutory language, defendant argues that the “People’s Sentencing Memorandum Pursuant to Penal Code Section 1170(b)” was untimely because it was filed only three days before the sentencing hearing, and his request to continue the hearing should have been granted to afford him additional time to file his statement in mitigation.

The record supports defendant’s contention that the prosecution’s sentencing memorandum, which contained a statement of circumstances in aggravation and mitigation and referred to “section 1170(b)” in its title, was not timely filed within four days of the sentencing hearing as required by the statute. If we assume that the proper

remedy was to grant his request for a continuance, the relevant issue is whether he has demonstrated that he was prejudiced by the denial of his request. (*People v. Watson* (1956) 46 Cal.2d 818.)

Defendant argues that because his request for a continuance was denied, he did not have an opportunity to argue that the imposition of consecutive life sentences was unconstitutional under *Graham v. Florida* (2010) ____ U.S. ____ [130 S.Ct. 2011, 176 L.Ed.2d 825], because he was a juvenile when he committed these crimes. However, defendant filed a request for alternative sentencing on July 6, 2011, in which he argued that his sentence should be imposed pursuant to *Graham*. Although defendant contends that a continuance would have allowed him to further develop this argument, we conclude he is incapable of establishing prejudice because *Graham* is inapplicable to homicide cases. (*Id.* at p. ____ [130 S.Ct. at p. 2030].)

IV. The Sentence on the Attempted Robbery Convictions Must Be Corrected

In sentencing defendant on the attempted robberies in counts 4, 5, 6, and 8, the court imposed concurrent sentences, consisting of the midterm of 18 months for the substantive crime, 20 years for the section 12022.53, subdivision (c) enhancement, and 10 years for the section 186.22, subdivision (b)(1)(C) enhancement. The court erred in imposing an 18-month term for the crime of attempted robbery; the midterm for an attempted robbery is two years. (§ 213, subd. (b) [notwithstanding § 664, attempted robbery “is punishable by imprisonment in the state prison”]; § 17, subd. (a) [“A felony is a crime that is punishable . . . by imprisonment in the state prison . . .”]; § 18, subd. (a) [“Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment for 16 months, or two or three years in the state prison . . .”].) Thus, the court imposed a legally unauthorized sentence for the attempted robbery convictions.

“The trial court had a duty to impose sentence in accord with the law.” (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390.) A legally unauthorized sentence is “subject to correction for the first time on appeal.” (*Id.* at p. 391.) As the trial court clearly intended

to impose the midterm for each of the attempted robberies, we will correct the sentence to reflect the proper two-year term for that offense.

DISPOSITION

The sentence for the attempted robbery convictions (counts 4, 5, 6 & 8) is changed to reflect a concurrent two-year term, in addition to the properly imposed sentences for the firearm and gang allegations. The clerk of the superior court is directed to prepare a corrected abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.